

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JANEIRO, INC. and GHASSAN DENHA,

Plaintiffs-Appellees,

v

END OF THE PARK, INC.,

Defendant-Appellant.

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UNPUBLISHED

November 15, 2002

No. 233217

Oakland Circuit Court

LC No. 99-015614-CH

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

In this real property action, defendant challenges the validity of dual options in plaintiffs'<sup>1</sup> lease consisting of a right of first refusal and a fixed price option. Defendant appeals as of right the trial court's grant of summary disposition under MCR 2.116(C)(10) and its order of specific performance enforcing the fixed price option. We reverse and remand.

I

The essential facts of this case are undisputed. Plaintiffs and defendant were lessees of adjacent property from a common lessor in Hazel Park. Plaintiffs leased the lower level of a building at 638 West Nine Mile, which contained a party store, Morgante's Market, and an upper level apartment, leased separately. Defendant leased an adjacent parcel at 634 West Nine Mile, which houses End of the Park, a bar/lounge, formerly known as Jim's Lounge, and an adjacent parking lot.

The parties' leases each included a right of first refusal with regard to the sale of their respective leased property. Defendant's lease originated in 1978 and granted defendant a right of first refusal with regard to the property leased (634 West Nine Mile). The lease for 638 West Nine Mile also originated in 1978; however, the right of first refusal was not incorporated until 1984 and was merely for the leased premises (638 West Nine Mile).

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<sup>1</sup> Plaintiff Ghassan Denha is the sole shareholder of plaintiff Janeiro, Inc. For ease of reference, this opinion refers to the plaintiffs jointly without distinguishing the particular rights of either plaintiff.

In June 1994, the lease for 638 West Nine Mile was modified to include an option to purchase the building at 638 West Nine Mile at a price of \$89,000; however, the right of first refusal provision was also modified to expressly state that it did not extend to the property occupied by Jim's Lounge, and the refusal operated only if the building at 638 West Nine Mile was sold separately; otherwise it was null and void.<sup>2</sup> Plaintiffs acquired their interest in the lease in November 1994 through an assignment from the then lessee.

In January 1998, defendant purchased both parcels of property (634 and 638 West Nine Mile) pursuant to its right of first refusal after the landlord received an offer to purchase from a third party. Following the purchase, defendant undertook extensive remodeling of the apartment above Morgante's Market (638 West Nine Mile) at a cost of approximately \$20,000. Several months later, in November 1998, plaintiffs notified defendant that they were exercising their option to purchase the 638 West Nine Mile property at the specified price of \$89,000. Defendant refused to sell the property, and plaintiffs filed the instant action seeking ownership of the building pursuant to the option to purchase in their lease. The parties filed cross-motions for summary disposition. Following a brief hearing, the court granted plaintiffs' motion and denied defendant's motion.

## II

Defendant argues that the trial court erred in granting summary disposition and specific performance because, contrary to the general rules of contract interpretation, the court's interpretation of the dual options provisions failed to give effect to both the right of first refusal and the fixed price options. Further, the landlord's intent was to make defendant's right to purchase superior to plaintiffs' because when the landlord entered into the options in plaintiffs' lease, he already had an option with defendant. Defendant maintains that the court's interpretation imposed a restraint on alienation in contravention of established law.

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether there is genuine issue of material fact warranting trial. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *First Public Corp v Parfet*, 246 Mich App 182, 186; 631 NW2d 785 (2001).

"An option is a preliminary contract for the privilege of purchase and not itself a contract of purchase." *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). The option consists of two distinct elements: "(1) [t]he offer to sell, which does not become a contract until accepted and (2) the completed contract to leave the offer open for the specified time." 92 CJS, Vendor and Purchaser, § 98, p 143. Thus, an option is basically an agreement by which the owner of the property agrees to give another a right to buy the property at a fixed price within a specified time. *Oshtemo Twp, supra* at 37. Here, the option contract contained specific

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<sup>2</sup> Neither plaintiffs nor defendant was a party to the lease modification at issue, which was entered into by the original lessor and a predecessor lessee.

contingencies or conditions precedent that had to be performed before the offer to sell could be accepted.<sup>3</sup> These contingencies had to be fulfilled or the contract of sale could not come into existence. *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953).

In its opinion and order, the trial court rejected defendant's argument that plaintiffs' option to purchase 638 West Nine Mile lapsed when defendant offered to purchase 634 and 638 West Nine Mile. The court distinguished *Stenke v Masland Development Co, Inc*, 152 Mich App 562; 394 NW2d 418 (1986), noting that plaintiffs' right of first refusal was never implicated and thus did not act to extinguish the option to purchase because the offer was for the entire parcel. We disagree.

As in *Stenke*, the instant case involves the operation and effect of contractual provisions for an option to purchase real property at a specified price coupled with a right of first refusal with regard to a third party sale of the property. In *Stenke*, the lessor sought avoidance of an option to purchase provision in a lease contract, which was exercised by the lessee and specified a purchase price of \$85,000. *Id.* at 566. Among other reasons, defendant argued that, as a practical matter, the option was an unlawful restraint on alienation because it placed an \$85,000 limit on the purchase price. *Id.* at 566. This Court rejected the lessor's argument, observing that it was "premised upon an interpretation of the option clause that the option to purchase at a fixed price can intervene in a circumstance in which the lessee has already been notified of a third-party offer," a premise which this Court previously rejected in *Amoco Oil Co v Kraft*, 89 Mich App 270; 280 NW2d 505 (1979):

The language of the lease clearly indicates that the parties intended to create alternative options of equal stature. Under plaintiff's interpretation of the contract, however, the first refusal option would cease to be an independent option and instead be transformed into a secondary option subordinate to the fixed price option. Plaintiff's interpretation would freeze the value of the leasehold at the amount of the fixed price option. No one would be willing to purchase the property for a higher price than the fixed price with the knowledge that he could lose his investment and be divested of the property if plaintiff decided to purchase the property at the lower fixed price. This being the case, plaintiff would never have occasion to exercise its first refusal option, and it would be rendered virtually meaningless. We find nothing in the contract to show that the parties intended to make the first refusal option dependent on the fixed price option or to fix a ceiling price on the value of the leasehold. Therefore, plaintiff's interpretation of the contract cannot stand.

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<sup>3</sup> "An option becomes vested when the conditions and procedures specified in the contract are complied with in such a manner as to give the lessee an immediate right to exercise the option ...." *Amoco Oil Co v Kraft*, 89 Mich App 270, 275 n 3; 280 NW2d 505 (1979). Specifically, for the first refusal option, plaintiffs were entitled to notice of a bona fide offer to purchase 638 West Nine Mile Road received from a third party, *if* the property was being sold separately; for the fixed price option, plaintiffs were required to notify the landlord that they wished to exercise their option to purchase.

Conversely, under defendants' interpretation of the contract, both options continue to be viable until one of them ceases to be merely a contingent interest and instead becomes a vested right, at which time the nonvested option is extinguished. Since defendants' interpretation of the contract keeps both options independent and viable, it is the more reasonable interpretation of the contract. [*Stenke, supra* at 568-569, quoting *Kraft, supra* at 273-275 (citations omitted).]

Thus, the *Stenke* Court concluded that the fixed price option did not constitute an unreasonable restraint on alienation because at any time the lessor could entertain an offer of purchase from a third party, which would render the fixed price option inoperative. *Stenke, supra* at 569. The fact that in this case plaintiffs' right of first refusal for 638 West Nine Mile became null and void upon an offer for the purchase of the entire block is of no import under the reasoning in *Kraft* and *Stenke*.

The key to the holding in *Kraft* and *Stenke* is that the parties must have intended that the dual provisions of the fixed price option and the right of first refusal operate together, with a contemplated sale under the right of first refusal provision rendering the option to purchase provision ineffective. Otherwise, the right of first refusal provision would be virtually meaningless—"[n]o one would be willing to purchase the property for a higher price than the fixed price with the knowledge that he could lose his investment and be divested of the property if [the lessee] decided to purchase the property at the lower fixed price." *Stenke, supra* at 569, quoting *Kraft, supra* at 274. We reject the trial court's distinction that because plaintiffs' right of first refusal was never viable in light of the offer to purchase the entire parcel, the fixed price option did not terminate when defendant purchased the property. In interpreting a contract, the court must read the agreement as a whole. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). Where a contract is susceptible of two different constructions, the preferred construction is that which is fair and reasonable. *Id.* Here, the fair and reasonable interpretation of the lease contract is that the sale of the property to a third party extinguishes the lessee's fixed price option to purchase the property.

Further, the primary goal of interpreting a contract is to honor the intent of the parties. *Kraft, supra* at 273; *Mikoczyski v Detroit Newspapers, Inc.*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). We find nothing in the lease that evinces an intent to make the fixed price option exclusive of and superior to the right of first refusal provisions. In fact, the limitations on plaintiffs' right of first refusal clearly indicate an understanding that the options granted to plaintiffs may be preempted by certain bona fide offers to purchase, i.e., an offer to purchase both parcels as a unit.

Here, as in *Kraft*, equity militates against plaintiffs' position. *Kraft, supra* at 275. Plaintiffs did not exercise their fixed price option. The property was then sold in accordance with contractual provisions known to plaintiffs, i.e., the right of first refusal provisions. Plaintiffs were unsuccessful in their attempts to persuade defendant to join together and purchase their respective parcels. After defendant purchased the properties, plaintiffs sat back quietly for the entire nine months that defendant undertook more than \$20,000 in renovations to the apartment above plaintiffs' market. Then, shortly after the renovations were completed and defendant had secured a tenant for the apartment, plaintiffs attempted to lay claim to the newly renovated premises on the basis of the \$89,000 fixed price option.

Plaintiffs, experienced business owners, surely could not have believed that defendant's investments were gratuitous or made knowing that plaintiffs could claim title to the premises for a price agreed to long before defendant's improvements. A party who seeks the aid of equity must come to the court with "clean hands." *Kraft, supra* at 275; *Rose v National Auction Group*, 466 Mich 453, 462-463; 646 NW2d 455 (2002). The trial court erred in granting plaintiffs' request for specific performance.

In light of our findings, we need not address defendant's remaining issues on appeal.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald